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K. M. Slimak

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EXAMINER

WINSTON, RANDALL O

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

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5 RECORD OF ORAL HEARING

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7 UNITED STATES PATENT AND TRADEMARK OFFICE

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9  
10 BEFORE THE BOARD OF PATENT APPEALS  
11 AND INTERFERENCES

12  
13 *Ex parte* K. M. SLIMAK

14  
15 Appeal 2009-007992  
16 Application 10/682,546  
17 Group Art Unit 1600

18 Oral Hearing Held: February 2, 2010  
19  
20

21 Before TONI R. SCHEINER, DONALD E. ADAMS, and  
22 LORA M. GREEN, Administrative Patent Judges.  
23

24 ON BEHALF OF THE APPELLANTS:

25  
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1           The above-entitled matter came on for hearing on Tuesday,  
2 February 2, 2010, commencing at 9:05 a.m., at the U.S. Patent and  
3 Trademark Office, 600 Dulany Street, 9th Floor, Alexandria, Virginia,  
4 before Jan M. Jablonsky, Notary Public.

5           THE CLERK: Good morning. Calendar number 5, appeal  
6 number 2009-007992, Mr. Pavelko.

7           JUDGE SCHEINER: Good morning.

8           MR. PAVELKO: Good morning.

9           JUDGE SCHEINER: Do you have a business card?

10          MR. PAVELKO: Yes, I do. This appeal involves just one --  
11 first paragraph of all the claims. This is a continuation of division, I believe  
12 -- I don't know what we called it, but it's a continuing case of a parent  
13 application issued as a patent. The parent case was dealing with treating  
14 some disease, symptoms of diseases or conditions.

15          In this case, we don't claim that at all. Yet the Examiner still  
16 perceives that that's what our invention is. He says we are enabled for  
17 certain treatments of conditions, symptoms, or diseases. And then he goes  
18 about saying, well, we're not limited to that, therefore our claims are not  
19 supported by the specification.

20          In response, I would just ask the Board to, you know, read the  
21 independent Claim 1 or 20. It's a relatively straightforward claim, method  
22 for dietary intervention, withholding all food from an animal for at least five  
23 days, except for tropical root crops, and feeding a concentrated form of  
24 tropical root crops to the animal for the at-least-five-day period. That's  
25 Claim 1. It doesn't have anything to do with treating. It doesn't say doing  
26 anything.

1           If you read the specification, there is a portion of the  
2 specification where it talks about treating diseases, symptoms, or conditions.  
3 There is also a lot of the specification that says there are other reasons for  
4 doing this. This particular inventor is an allergist. Many people have food  
5 allergies.

6           She has come up with a lot of cute phrases or slogans here: "If  
7 you don't eat it, it can't hurt you."

8           So, what she has done, instead of trying to test for all the  
9 possible food allergies somebody might have, she has come the other way  
10 around, and eliminated everything except these concentrated forms of  
11 tropical root crops. They are concentrated because, as she says in the  
12 specification, you could not get enough food sustenance from eating a raw or  
13 a fresh or a cooked whole fruit or crop, because there is just not enough  
14 calorie intake in that. So she's got to concentrate that to make it a smaller  
15 proportion, but higher yield of calories.

16           And by taking only this tropical root crop, which is unusual  
17 food for most people in the Northern Hemisphere or United States, you're  
18 eliminating what they would normally eat. So you start off with this. If you  
19 still have the allergies, you know it's even in the tropical root crops. But if  
20 you don't have the allergy, then as we go into some of the dependent claims,  
21 we can introduce certain foods in a rotation, and then see if the allergy or  
22 conditions of the food allergy reappear. And this way, you know, that is  
23 exactly what she says -- one of the reasons she would do this particular  
24 method. It has nothing to do with treating a disease, condition, or symptom.

25

26           And we pointed this out to the Examiner. We pointed out that  
27 we're not claiming what he thinks we're claiming, we pointed out case law

1 that says, you know, really, 112, second paragraph leaves it to the inventor  
2 to define the invention, not to the Examiner. And we pointed out we're just  
3 not trying to claim this. He doesn't want to listen. He just continues to say  
4 we're only enabled for treating certain diseases, which is not what this claim  
5 method is about.

6 And so, for those reasons, we believe the rejection is not –

7 JUDGE SCHEINER: Well, I think we understand those issues.  
8 Do you have anything –

9 MR. PAVELKO: Thank you very much.

10 JUDGE SCHEINER: Unless you had something further to add,  
11 I think we do understand the issue.

12 MR. PAVELKO: Okay.

13 Whereupon, at 9:09 a.m., the proceedings were concluded.  
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